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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 171

THE HYGIENIC PRODUCTS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Sixth Circuit and
BRIEF IN SUPPORT OF PETITION.

MEYER A. COOK,
Standard Bldg.,
Cleveland, Ohio,
Solicitor for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Supreme Court of the United States:

This petition of The Hygienic Products Company respectfully shows:

STATEMENT OF THE MATTER INVOLVED.

Petitioner is an Ohio corporation, having its principal place of business at Canton, Ohio. On September 25, 1936 it filed its petition before the United States Board of Tax Appeals for a redetermination of a deficiency determined by the Commissioner of Internal Revenue set forth in his letter Cleveland IRA :90D, dated September 9, 1936. The petition was in the nature of an appeal from the refusal of the Commissioner to allow a deduction of $12,645.83 from taxes due the United States for the year 1934. Of this amount $10,848.30 represents taxes paid to the Canadian Government in the year 1934, determined, for the first time, in 1934 to be due the Canadian Government for the tax years 1930, 1931, 1932 and 1933. The petitioner has been

engaged in business in the Dominion of Canada for a period of more than fifteen years, being represented by Harold F. Ritchie and Company, Ltd., manufacturers representatives. The manner of doing business of the petitioner and its representative in Canada has been the same during the entire period. The Dominion of Canada in the year 1924 enacted an income tax law. The petitioner's representative in Canada advised the petitioner that it was not amenable to the income tax law of the Dominion of Canada and, accordingly, no returns for Canadian income tax were filed by the petitioner. The Dominion of Canada on August 22, 1933 requested the petitioner to file income tax returns for the years 1930, 1931, 1932 and 1933. Thereafter Dominion of Canada income tax returns were filed by the petitioner for the years 1930, 1931, 1932 and 1933 under respective dates of November 14, 1933, November 14, 1933, September 19, 1933 and June 19, 1934. Petitioner, until July 25, 1934, contested the imposition of any income tax by the Dominion of Canada on the theory that it is not doing business in the Dominion of Canada within the purview of the income tax law of the Dominion of Canada and it was not definitely determined to the satisfaction of the petitioner that it was amenable to the income tax law of the Dominion of Canada, at which time payment was made to the Dominion of Canada in the sum of $9,722.33, representing taxes, penalties and interest for income taxes due the Dominion of Canada for the years 1930, 1931 and 1932. On November 26, 1934 payment was made to the Dominion of Canada in the sum of $1,125.97, representing taxes, penalty and interest due the Dominion of Canada for the year 1933. The petitioner claimed a deduction from its taxes to the United States for 1934 for the amount paid to the Canadian Government under the provisions of Section 131 of the Revenue Act of 1934. The case was submitted upon stipulation of facts (R. 10, 11), the testimony of a Certified Public Accountant in behalf of petitioner (the only witness) and upon

briefs, and in a memorandum opinion the Board of Tax Appeals approved the deficiency determined by the respondent. (R. 12-18.)

Upon the transcript, an agreed statement of the evidence before the Board of Tax Appeals, briefs and oral argument the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the Board of Tax Appeals as set forth in its opinion. (R. 31-33.)

The question involved is whether the petitioner must submit to double taxation by reason of an arbitrary label attached to the petitioner's bookkeeping method by the Commissioner of Internal Revenue notwithstanding the provisions of Section 131 of the Revenue Act of 1934.

Petitioner claims that the first and only opportunity it had to signify its desire to have the benefits of said section 131 was in its income tax return for the year 1934, and the Board of Tax Appeals in effect imposed on the petitioner a duty to do the impossible, and that, therefore, the Circuit Court erred in affirming the judgment of the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT.

The United States Circuit Court of Appeals for the Sixth Circuit in this case decided a question of general law in a way probably untenable and in conflict with the weight of authority which abhors double taxation and construes statutes liberally in favor of the taxpayer. The precise question has not been, but should be, settled by this Court.

There are no other Circuit Court decisions on the questions involved in this case, but there is the decision in the case of *Arthur Jewett Connor v. United States* (1937—D. C. N. H.) 19 F. Supp. 97, in which the taxpaying petitioner was awarded a refund by reason of taxes paid the Canadian Government under facts practically identical to those in this case. The United States did not appeal to the First Circuit.

The holding of the Circuit Court of Appeals in the present case is believed to be patently erroneous and the interests of the law require that it be reversed.

PRAYER.

WHEREFORE, your petitioner prays that a writ of certiorari may issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 8048, The Hygienic Products Company, Petitioner-Appellant, v. Commissioner of Internal Revenue, Respondent-Appellee, and that said judgment may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

THE HYGIENIC PRODUCTS COMPANY,

By: MEYER A. COOK,

Its Solicitor.

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

THE HYGIENIC PRODUCTS COMPANY,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the Circuit Court of Appeals appears in the Record at pp. 31, 32 and 33 and was entered April 12, 1940.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered April 12, 1940 (R. 31-33). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. A., Section 347 (a).

STATEMENT OF CASE.

The question involved in this case is whether this taxpayer should be denied the right to deduct from its tax liability to the United States taxes paid by it to a foreign government within the following provisions of the Revenue Act of 1934:

Section 41. General Rule.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or

calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

Section 131. Taxes of foreign countries and Possessions of the United States.

(a) Allowances of credit.—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this chapter shall be credited with:

(1) In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States;

* * *

(d) Year in which credit taken—the credits provided for in this section may, at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possessions of the United States accrued, subject, however, to the conditions prescribed in subsection (c) of this section. If the taxpayer elects to take such credits in the year in which the taxes of the foreign country or the possessions of the United States accrued, the credits for all subsequent years shall be taken upon the same basis and no portion of any such taxes shall be allowed as a deduction in the same or any succeeding year.

* * *

This petitioner for a number of years prior to the enactment of the Canadian income tax has done business there. Its method of doing business there has been the same. The first opportunity the petitioner had to make an election under Section 131 was in 1934. There was no attempt on the part of the petitioner to alter its accounting procedure when it made its election. The Commissioner and the Courts below have attempted to justify the disallowance of the deduction claimed by arbitrarily disapproving of the label "hybrid system" of accounting and just as arbitrarily labelling petitioner's accounting method as the "accrual method."

In the case of *Morris-Poston Coal Co. vs. Commissioner of Internal Revenue*, 42 F. (2d) 620, it was held:

"1. Under income tax law, selection of system of keeping books is primarily for taxpayer.

4. Taxpayer customarily employing combination of cash and accrual methods in bookkeeping does not change methods merely because having changed character of business, he classified new income in accordance with honest judgment."

Fleischmann Construction Company, et al. vs. United States to the use of Forsberg, et al., 270 U. S. 349, the sixth syllabus of the case held:

> "The strict letter of an Act must yield to its evident spirit and purpose, when this is necessary to effectuate the intent; and unjust or absurd consequences are to be avoided if possible."

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that the petitioner's accounting method was the accrual method.

2. In holding that the petitioner's accounting method does not clearly reflect income unless it conforms to "one method."

3. In holding that the petitioner should have recognized its tax liability to Canada before it was determined.

4. In affirming the decision of the United States Board of Tax Appeals.

ARGUMENT.

I.

This Court has repeatedly undertaken to resolve doubts which inevitably follow from conflicting decisions in lower Federal Courts. This has been demonstrated recently in *Raybestos-Manhattan, Inc. v. United States*, 296 U. S. 60 (1935) and *Founders' General Corp. v. Hoey, Collector of Internal Revenue*, 300 U. S. 268 (1937), wherein this Court granted certiorari.

In the case of *Arthur Jewett Connor v. U. S.* (1937—D. C. N. H.), 19 F. Supp. 97, the taxpayer was awarded a refund representing a tax paid to the Dominion of Canada on income from sources in that country which was received by the taxpayer during the year 1932, which sum the taxpayer claimed should have been credited on the income tax assessed against him by the Commissioner of Internal Revenue at Portsmouth, New Hampshire.

The question presented was whether or not the taxpayer was entitled to a credit under Section 131 of the Revenue Act effective in 1932 against the income taxes paid by him to the United States for the year 1932 of the income taxes paid by him to the Canadian Government in 1934 for the year 1932, when the taxpayer is on the cash basis and did not signify in his income tax return for 1932 his desire to have the benefits of said section.

All of the income upon which the Canadian tax was paid was included in the gross income shown on the Federal income tax return which the taxpayer filed with the Commissioner for the year 1932 and a tax was assessed thereon.

The Government contends that the credit was rightfully disallowed by the Commissioner of Internal Revenue under the Subdivision (a) of Section 131 because the taxpayer did not claim the credit on his original 1932 tax return.

The Commissioner disallowed the claim for refund and the claim was prosecuted to the District Court of New Hampshire. The Court in its opinion held:

> "I hold that the Petitioner is not barred from obtaining a refund by reason of the fact that he did not 'signify in his original return his desire to have the benefits of Section 131 (a).' The statute should not be construed to require the impossible."

The Court came to the conclusion by setting forth its reasoning as follows:

> "What I believe to be the law concretely applied to the facts in the instant case leads to the following conclusions: The Petitioner filed in his original return for 1932 the amount of income derived from operations in Canada and the Commissioner assessed a tax thereon amounting to $4,820.34. At that time the Petitioner had no reason to believe that a tax thereon would be assessed by the Canadian Government as no such tax had been theretofore assessed.
>
> "The petitioner was not called upon to make any election under Section 131 (a) as the word 'election' signifies a choice between two or more methods. The Petitioner in filing his 1932 returns did what any honest taxpayer would do with the knowledge at hand. He included the Canadian income in his tax return. The first information he had that he was liable to an assessment under the Canadian laws came to him in the fall of 1933. After he had obtained advice and became satisfied that the tax was legally assessed against him he paid the same on February 6, 1934."

As can be seen, the facts and circumstances under which the Petitioner in the instant case claims the right to a deduction are practically the same as those under which the Dis-

trict Court of New Hampshire allowed the taxpayer a refund.

The Government did not prosecute an appeal to the First Circuit in the *Connor* case.

We, therefore, find a situation whereby a taxpayer in the Sixth Circuit is denied the benefits of Section 131 and a taxpayer of the First Circuit is permitted to avail himself of them.

II.

The Board of Tax Appeals and the Circuit Court of Appeals in the instant case cite numerous decisions by this Court as being controlling in the determination of the question herein involved. It is respectfully urged that the decisions of this Court cited by the Board of Tax Appeals and the Circuit Court of Appeals are not applicable in that in each instance there was a departure from the taxpayer's customary accounting method for the obvious purpose of avoiding a tax. In the instant case the bona fides of the taxpayer were not and cannot be questioned. It attempted to avail itself of the provisions of Section 131 of the Revenue Act at the first opportunity. It was justified in its resistance of the Canadian income tax because of the fact that no demand or request was made by the Canadian Government for years prior to 1930 and during which this petitioner had conducted business in the Dominion of Canada in the same manner.

During the years in question in the instant case this petitioner reported as income to the United States Government all of its income, including its income from sources within the Dominion of Canada, without making any deduction or allowance for taxes or tax liability to the Dominion of Canada. On this amount taxes were paid in each of the years involved to the United States Government.

III.

The petitioner herein urges that a failure to grant the relief sought would result in double taxation specifically sought to be avoided by the enactment of Section 131 of the Revenue Act. It is significant that prior to 1924 the broad aspect of said section as it relates to the election to be made by the taxpayer as to when he may avail himself of its provisions were not included. This Court has on several occasions throughout its history in interpreting tax laws steadfastly held that tax laws should be construed liberally in favor of the taxpayer. The following are a few cases on that proposition:

In *Bowers vs. Fuller*, 273 U. S. 346, the third syllabus reads as follows:

> "Taxing laws are to be interpreted liberally in favor of the taxpayer."

In *Old Colony Railroad Company vs. Commissioner of Internal Revenue*, 284 U. S. 552, 76 Fed. 485, the fifth syllabus reads as follows:

> "Terms used in tax statutes are, in case of doubt, to be given construction most favorable to the taxpayer."

Darby-Lynde Co. vs. Alexander, Collector of Internal Revenue (C. C. A. Tenth Circuit), 51 F. (2d) 56, says:

> "4. Court must ascertain true meaning of statute where language is doubtful, or where strict construction would lead to injustice or absurd results."

Commissioner of Internal Revenue vs. Wilson (C. C. A. Tenth Circuit), 60 F. (2d) 501, states:

> "2. Taxing act, including provisions of limitation embodied therein, should be liberally construed in taxpayer's favor."

In Volume 3 of *Paul Mertens' Law of Federal Income Taxation*, Sections 31.07 and 31.08, we find the following discussion:

"31.07.—*Election as to Year in Which the Credit for Taxes Is to Be Taken.* The taxpayer is given an option to take the credit for taxes and also an option as to the year in which it shall be taken. It may be taken in the year in which the tax is paid or the year in which the taxes of the foreign countries or possessions of the United States accrued. This election is 'irrespective of the method of accounting employed in keeping his book.' (37)[1] This provision represents a departure made in the 1924 Act from previous statutes which required the credit to be taken by a taxpayer on the cash basis in the year in which the taxes were paid (38)[2] and by taxpayers on the accrual basis in the year of accrual of the taxes. (39)[3] This option is subject to the adjustments elsewhere discussed. (40)[4] If the taxpayer elects to take the credit in the year of accrual, he is bound by the election and the credit for all subsequent years must be taken on the same basis. Furthermore no portion of the taxes will be allowed as a deduction in the same or any succeeding year."

"31.08. *When Foreign Income and Profits Taxes Should Be Credited.* Taxpayers on the accrual basis should take the credit for foreign taxes in the year

---

"[1] (37) 1934, 1932, 1928 Acts, Sec. 131 (d); 1926 and 1924 Acts, Sec. 222 (c), 238 (c); Reg. 77, Art. 696; Reg. 74, Art. 697; Reg. 69 and 65, Art. 387.

[2] (38) 1924 Act, Sec. 222 (c), 238 (c). As to the 1918 Act, see *Chester D. Griesemer*, 10 B. T. A. 386, and I. T. 1630, C. B. II-1, p. 163, involving a net loss question; as to the 1921 Act, see *James R. Hatmaker*, 15 B. T. A. 1044; *David A. Cunningham*, 9 B. T. A. 1050; *Albert D. Hewinson*, 1 B. T. A. 1080.

[3] (39) L. O. 987, C. B. 2, p. 196; A. R. M. 173, C. B.-I-1, p. 197.

[4] (40) See Sec. 31.09."

in which the taxes accrue; (41)[1] taxpayers on the cash basis should take the credit for foreign taxes in the year in which the taxes are paid. However, taxpayers on the cash basis are given the privilege of taking the credit for foreign taxes, if election to do so is made, in the year of accrual, in which event the credit for foreign taxes for subsequent years must be taken upon the same basis. (42)[2] In this connection, the question to be decided for purposes of the foreign tax credit provision, as well as for other purposes, is whether the taxpayer is on the accrual basis. (43)[3] The principles of accrual are the same whether a foreign tax is to be deducted or to be applied as a credit, and the treatment of the subject is, therefore, consolidated elsewhere in this book. (44)[4] The general rule is that foreign taxes accrue where all the events occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. Even a contest and denial of liability will not postpone accrual. (45)[5]"

"[1] (41) See *Purdy & Henderson Co.*, 4 B. T. A. 70; *Ruud Mfg. Co. v. Comm.*, 45 F. (2d) 63 (C. C. A. 3rd, 1930), to the effect that the credit for taxes paid to Canada in 1921 assessed for 1918 and 1919 under the Business Profits War Tax Act of 1916, is allowable as a credit in 1921 where the taxes did not accrue or become payable until assessment notices were received in 1921.

[2] (42) G. C. M. 9459, C. B. X.-1, p. 169.

[3] (43) *Niles-Bement Pond Co. v. U. S.*, 281 U. S. 357, 74 L. Ed. 901, 50 S. Ct. 251 (1930).

[4] (44) See Sec. 25.31.

[5] (45) *Russell-Miller Milling Co. v. Helvering*, 69 F. (2d) 392 (App. D. C., 1934); *Carter Rice & Co.*, 28 B. T. A. 687, pointing out the distinction between the 1921 and subsequent acts."

For all of these reasons, petitioner suggests that the decision below should be reviewed by this Court.

Respectfully submitted,

MEYER A. COOK,

Solicitor for
The Hygienic Products Company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–18) is reported at 37 B. T. A. 202. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 31–33) is reported at 111 F. (2d) 330.

JURISDICTION

The final decree of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals

was entered April 12, 1940 (R. 29). Petition for a writ of certiorari was filed June 20, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the amount of taxes paid by the taxpayer in 1934 to the Canadian Government upon income earned in the years 1930 to 1933, inclusive, may be allowed as a credit against taxpayer's 1934 federal income tax, reported on the accrual basis.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 31. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.
>
> The amount of income, war-profits, and excess-profits taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax, to the extent provided in section 131.
>
> SEC. 41. GENERAL RULE.
>
> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such

method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. (For use of inventories, see section 22 (c).)

SEC. 43. PERIOD FOR WHICH DEDUCTIONS AND CREDITS TAKEN.

The deductions and credits provided for in this title shall be taken for the taxable year in which "paid or accrued" or "paid or incurred", dependent upon the method of accounting upon the basis of which the net income is computed, unless in order to clearly reflect the income the deductions or credits should be taken as of a different period. In the case of the death of a taxpayer there shall be allowed as deductions and credits for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly allowable in respect of such period or a prior period.

SEC. 131. TAXES OF FOREIGN COUNTRIES AND POSSESSIONS OF UNITED STATES.

(a) *Allowance of Credit.*—If the taxpayer signifies in his return his desire to have the benefits of this section, the tax imposed by this title shall be credited with:

(1) *Citizen and Domestic Corporation.*—In the case of a citizen of the United States

and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States; and

* * * * *

(d) *Year in Which Credit Taken.*—The credits provided for in this section may, at the option of the taxpayer and irrespective of the method of accounting employed in keeping his books, be taken in the year in which the taxes of the foreign country or the possession of the United States accrued, subject, however, to the conditions prescribed in subsection (c) of this section. If the taxpayer elects to take such credits in the year in which the taxes of the foreign country or the possession of the United States accrued, the credits for all subsequent years shall be taken upon the same basis, and no portion of any such taxes shall be allowed as a deduction in the same or any succeeding year.

(e) *Proof of Credits.*—The credits provided in this section shall be allowed only if the taxpayer establishes to the satisfaction of the Commissioner (1) the total amount of income derived from sources without the United States, determined as provided in section 119, (2) the amount of income derived from each country, the tax paid or accrued to which is claimed as a credit under this section, such amount to be determined under rules and regulations

prescribed by the Commissioner with the approval of the Secretary, and (3) all other information necessary for the verification and computation of such credits.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 41–1. *Computation of net income.*— Net income must be computed with respect to a fixed period. Usually that period is 12 months and is known as the taxable year. Items of income and of expenditures which as gross income and deductions are elements in the computation of net income need not be in the form of cash. It is sufficient that such items, if otherwise properly included in the computation, can be valued in terms of money. The time as of which any item of gross income or any deduction is to be accounted for must be determined in the light of the fundamental rule that the computation shall be made in such a manner as clearly reflects the taxpayer's income. If the method of accounting regularly employed by him in keeping his books clearly reflects his income, it is to be followed with respect to the time as of which items of gross income and deductions are to be accounted for. (See articles 42–1 to 42–3.) If the taxpayer does not regularly employ a method of accounting which clearly reflects his income, the computation shall be made in such manner as in the opinion of the Commissioner clearly reflects it.

ART. 131–6. *When credit for taxes may be taken.*—The credit for taxes provided by section 131 (a) may ordinarily be taken either in the return for the year in which the taxes accrued or in which the taxes were paid, dependent upon whether the accounts of the taxpayer are kept and his returns filed upon the accrual basis or upon the cash receipts and disbursements basis. Section 131 (d) allows the taxpayer, at his option and irrespective of the method of accounting employed in keeping his books, to take such credit for taxes as may be allowable in the return for the year in which the taxes accrued. An election thus made under this section or under section 222 (c) or 238 (c) of the Revenue Act of 1924 or 1926, or under section 131 (d) of the Revenue Act of 1928 or 1932, must be followed in returns for all subsequent years, and no portion of any such taxes will be allowed as a deduction from gross income for 1934 or any subsequent taxable year.

STATEMENT

The evidentiary facts will be found in the opinion of the Board of Tax Appeals (R. 12–18), which sets out in full the stipulation of facts (R. 10–11). The testimony of the single witness produced by the taxpayer is summarized in a statement prepared as part of the record on appeal (R. 24–25).

The taxpayer, an Ohio corporation, had done business in Canada through an agent for more

than fifteen years prior to 1937 (R. 12). In 1924 an income tax law went into effect in Canada, but the taxpayer's Canadian representative advised taxpayer that it was not subject thereto. Accordingly, the taxpayer filed no returns with the Canadian Government (R. 13).

In August 1933, the Canadian Government asked the taxpayer to file returns for the years 1930 to 1933, inclusive. This the taxpayer did in September and November 1933, and June 1934 (R. 13). The taxpayer contested the imposition of Canadian income tax on the theory that it was not doing business in Canada within the purview of the Canadian law. Taxpayer was not convinced that it was amenable to the Canadian income tax law until June 25, 1934, at which time it paid $9,722.33, representing taxes, penalties, and interest due the Canadian Government for the years 1930, 1931, and 1932. In November 1934, taxpayer paid $1,125.97, representing taxes, penalty, and interest due the Canadian Government for the year 1933 (R. 13).

The income tax returns filed by the taxpayer have all contained the statement that they were made upon the accrual basis and not upon the cash receipts and disbursements basis (R. 13). Taxpayer consistently throughout its corporate existence has shown gross income from sales as received when the sales were made, whether or not cash was collected at the time. Inventories of goods on

hand are used at the beginning and end of each year in determining the cost of goods sold. The expenses of the taxpayer have been consistently recorded only after cash was disbursed and the taxpayer has never accrued on its books any federal, state, county, municipal, or other taxes. But the Commissioner in adjusting the taxpayer's returns has accrued these taxes (R. 13–14). The taxpayer always paid its bills currently (R. 14–15).

The Board found that the accounting system employed by the taxpayer was predominantly an accrual system (R. 17), and that the Commissioner consistently corrected the returns of the taxpayer where mistakes resulted because of the deduction of taxes on the cash basis (R. 16–17). Consequently, the Board found that the taxpayer could not take a credit for Canadian income taxes in the year when they were paid as distinguished from the years when they accrued. The Board also found that the Canadian income taxes paid in 1934 had all accrued prior to that year and the credits sought by the taxpayer were disallowed (R. 18). The Circuit Court of Appeals affirmed the Board's decision.

ARGUMENT

Taxpayer's position below was primarily that it employed a hybrid system of accounting, involving inventories and accrual of income items but recording expenditures as made. It urged that the system correctly reflected taxable income, and ac-

cordingly that taking credit for the Canadian taxes in the year of payment, rather than that of accrual, was proper (R. 3, 21–22). The Board of Tax Appeals found that the taxpayer's bookkeeping system was predominantly an accrual one and that the Commissioner correctly refused to permit a departure from that system through credit for Canadian taxes in a year other than that of their accrual. The Circuit Court of Appeals correctly affirmed. *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357; *Mass. Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273–274.

The taxpayer does not assert any conflict among the circuit courts of appeals, but alleges simply a conflict with *Connor* v. *United States,* 19 F. Supp. 97 (N. H.). There, as in the instant case, the taxpayer became convinced of his liability for Canadian income tax in a year subsequent to that for which it was levied. But, unlike the taxpayer here, Connor did not attempt to accrue the credit in the year of payment. Instead, he filed an amended federal tax return seeking the credit in the year for which the Canadian tax was levied. By reason of Section 131 (d) of the Revenue Act of 1934, *supra,* Connor, who was on the cash basis, could elect to take the credit on the accrual basis. The court was concerned with whether his failure to show the credit in the original return constituted an election not to accrue the credit. The portion of the opinion quoted by the taxpayer here (Br. 9) was ad-

dressed to that issue. But Section 131 (d) does not alter the basic rule of Section 43, *supra,* that a taxpayer on the accrual basis must take the credit for foreign taxes in the year of their accrual.

Section 131 (d) permits a taxpayer on the cash basis to accrue his credits for foreign taxes, but it does not allow the converse. A taxpayer on the accrual basis is not given any election to use the credit when the foreign taxes are actually paid: being on the accrual basis, he may employ that credit only when the foreign taxes accrue. The taxpayer here was on the accrual basis, and consequently could not take the credit for pre-1934 Canadian taxes in 1934.

CONCLUSION

The decision of the Circuit Court of Appeals in the instant case is correct and is not in conflict with any other decision. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General,

SEWALL KEY,
J. LOUIS MONARCH,
ARTHUR A. ARMSTRONG,
Assistant Attorney General.

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